

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Universal Service Contribution Methodology)	WC Docket No. 06-122
)	
A National Broadband Plan for Our Future)	GN Docket No. 09-51

COMMENTS OF TRACFONE WIRELESS, INC.

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SUMMARY

TracFone opposes shifting from a revenues-based methodology to either a numbers or connections-based methodology. Those methodologies are not competitively neutral and non-discriminatory, and would significantly increase the burdens on providers of services used largely by low-volume low-income consumers and ultimately those consumers themselves. Such methods also would inevitably result in imposing USF contributions on intrastate services in violation of the statutory requirement that the federal USF be supported only by interstate telecommunications

The Commission should recognize that USF contributions from providers of non-billed services present special problems since such providers, including, for example, providers of prepaid wireless services, have no means to collect any portions of their USF contributions from end users through a billing process. For such services, TracFone proposes that the Commission do what, to date, 28 states have done in the analogous situation of 911 fees -- require that USF contributions be collected at the point of retail sale of non-billed services. A point-of-sale collection method is workable whether the retail vendor is the service provider itself or is an independent vendor.

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TracFone Wireless, Inc. (“TracFone”), by its attorneys, hereby submits its comments in response to the Commission’s further notice of proposed rulemaking in this proceeding.¹

Introduction

Whether and how to reform the manner in which contributions to the Universal Service Fund (“USF”) are assessed on providers of interstate telecommunications services has been before the Commission in various iterations for more than a decade. During that period, the Commission has seen the size of the USF increase, and the traditional funding base -- revenues from interstate telecommunications services, primarily interstate long distance service -- reduced. It has considered broadening the base to encompass providers of services which utilize “Telecommunications,” in addition to interstate “Telecommunications Service,” and has considered changing the methodology from one based on a percentage of interstate telecommunications service revenues to variants of systems which would base assessments on network connections and/or assigned North American Numbering Plan telephone numbers.

TracFone is a reseller of commercial mobile radio services. TracFone services are provided on a prepaid, non-billed, basis only. Its services are marketed under several brand

¹ In the Matter of Universal Service Contribution Methodology, et al, FCC 12-46, released April 30, 2012 (“Further Notice” or “FNPRM”). Notification of the FNPRM was published in the Federal Register on June 7, 2012. 77 Fed. Reg. 33896.

names, including TracFone[®], NET10[®], Straight Talk[®], and SafeLink Wireless[®] (its Lifeline service which it offers in most of the forty-one states where it has been designated as an Eligible Telecommunications Carrier pursuant to Section 214(e) of the Communications Act²). Unlike providers of traditional post-paid or billed services, TracFone has no billing mechanism for recovery from consumers of any portion of its USF contributions. Moreover, TracFone's pay-as-you-go services, with no contracts, no monthly minimums, no volume commitments, no termination penalties, and no credit approval requirements, are used in large part by low-volume consumers and by low-income consumers. For that reason, TracFone has long been concerned about the impact of the USF contribution methodology on its ability to provide affordable service to millions of consumers who either cannot afford or cannot qualify for traditional wireless service plans, but who rely on the availability of affordable prepaid services to meet their telecommunications needs.

Since 2002, TracFone has supported refinements and improvements to the revenues-based methodology including, for example, increasing the wireless safe harbor to more realistic levels given the increase in interstate wireless calling as a result of "all distance" rate plans adopted by most wireless providers. However, it has opposed proposals to shift from the current revenue-based methodology to a numbers or connections-based methodology since such a change would materially increase the USF burden borne by the company and its vulnerable, low-income consumers.³ In 2008, the Commission considered, but did not adopt, a comprehensive plan which would have reformed the USF and intercarrier compensation. Among those reforms, the proposed plan would have mandated a numbers-based USF contribution methodology but

² 47 U.S.C. § 214(e).

³ See, e.g., Comments of TracFone Wireless, Inc., CC Docket No. 96-45, filed April 22, 2002, Reply Comments, filed May 13, 2002, Comments file February 28, 2003, Reply Comments and Comments on Staff Study, filed April 18, 2003.

would have established a limited exception from the numbers-based methodology for prepaid wireless services.⁴ That exception was based upon a proposal presented to the Commission by TracFone in 2007.⁵ That USF by the Minute plan for prepaid wireless services was supported by many throughout the industry, including AT&T, Verizon, and CTIA.

While that comprehensive USF/intercarrier compensation reform plan proposed by then-Chairman Kevin Martin was not adopted, none of the Commissioners at that time expressed any opposition to or disagreement with the alternative contribution plan for prepaid wireless services. If the Commission elects to migrate to some variant of a numbers or connections-based plan in this proceeding, TracFone respectfully urges the Commission to remain mindful that such a plan could materially increase the USF support burden for providers of prepaid wireless services and for millions of low-volume, low-income consumers of those services, and to include within any such reform plan an appropriate alternative (as it would have done 2008) which reduces that burden.

I The Commission Should Not Impose a Contribution Methodology Based on Network Connections or Telephone Numbers

As TracFone has explained in numerous prior submissions, there are substantial legal and public interest problems with both connections-based and telephone numbers-based contribution methodologies. Both methods potentially can result in forced contributions on intrastate services. Although Section 254(d) imposes mandatory contribution obligations on **interstate**

⁴ *High Cost Universal Service Support, et al*, (Order on Remand and Report and Order and Further Notice of Proposed Rulemaking), FCC 08-262, released November 5, 2009, Attachment A (Chairman's Draft Proposal), ¶¶ 135-139).

⁵ CC Docket No. 96-45 and WC Docket No. 05-337, Notice of Ex Parte Presentation, filed July 12, 2007. Attached to that letter is a document entitled "Prepaid Wireless 'By the Minute' USF Contribution Proposal." That paper describes the USF By The Minute plan which was discussed favorably in the aforementioned Draft Proposal. For the convenience of the Commission, its staff, and other parties to this proceeding, a copy of that paper is attached to these comments.

telecommunications services and provides the Commission with permissive authority to extend contribution obligations to **interstate** telecommunications, nothing in Section 254(d) or anywhere else in the Act empowers the Commission to impose USF contribution requirements on intrastate telecommunications services or on intrastate telecommunications. Telephone numbers are assigned by local exchange carriers and wireless carriers. At the time of such assignments, it is not known whether those numbers will be used by the assigned customers for any interstate services. Some numbers will be used to originate and terminate intrastate and interstate calls; others will be used only to originate and terminate local and intrastate calls. The unassailable fact that some portion of assigned numbers will be used only for intrastate telecommunications means that assessment of USF contributions on those numbers will inevitably result in imposition of USF charges on wholly intrastate services in violation of Section 254(d) and the holding in Texas Public Utilities Counsel v. FCC.⁶

Similarly, network connections may be used for intrastate telecommunications, interstate telecommunications, or combinations of both. Therefore, assessing USF contribution obligations on network connections may, in many instances, result in USF assessments on network connections used only for intrastate telecommunications, again in violation of the TOPUC v. FCC.

In addition to exceeding its jurisdictional authority under Section 254(d) to impose USF contribution requirements on interstate telecommunications services and interstate telecommunications, there are other reasons why these alternative contribution methodologies such as connections or numbers-based methodologies should be rejected. Of paramount importance, numbers-based and connections-based contribution methods would impose a

⁶ 183 F. 3d 393 (5th Cir. 1999).

disproportionate burden and economic hardship on many low-income consumers and the carriers which serve them. As a provider of prepaid services, TracFone is aware of its consumers' usage patterns. It knows that many users of prepaid services use their prepaid phones for limited purposes such as emergency calling and to keep in contact with family members, especially children. It also is aware that many of its customers' usage is primarily for local and intrastate calling. Based on its customers' actual usage, TracFone's per customer USF obligation under the current revenue-based methodology is substantially less than \$1.00 per month. Thus, imposition of a monthly per number charge of \$1.00 would significantly increase the price of prepaid wireless services to millions of low-income consumers, many of whom have no other available and affordable means for obtaining telephone service in general, and wireless telecommunications service in particular.

Providers of prepaid services have no opportunity to collect USF pass through charges as line item surcharges on customer bills. In addition, since service in the form of prepaid airtime cards is purchased and paid for in advance rather than in arrears, TracFone and other providers of such services do not know -- indeed, cannot know -- at the time of purchase what portion of the purchased amount of prepaid airtime will be used for interstate service. As a result, it would become necessary for such providers to increase their prices to all consumers in order to offset their additional USF funding burden without regard to those consumers' levels of interstate usage. Since providers of billed in arrears services would not have to confront this dilemma, it is readily apparent that such funding mechanisms could not be reconciled with the competitive neutrality obligation codified at Section 253 of the Act.⁷ In the FNPRM, the Commission notes that carriers with USF contribution obligations should not be forced to compete with providers of

⁷ 47 U.S.C. § 253.

alternative services which do not have USF contribution obligations.⁸ TracFone concurs with that objective. However, the same principles of competitive neutrality and fairness compel that providers who are unable to recover their USF contributions from consumers should not have to compete with those that have the ability through the billing process to recover their USF contributions from consumers.

II. The Commission's Has the Authority to Prohibit Providers of Interstate Telecommunications Services From Recovering Their USF Contributions Through Billed Surcharges and Principles of Competitive Equity and Fairness Require it to Exercise that Authority

In the FNPRM, the Commission has proposed to establish a rule prohibiting recovery of federal universal service contributions through line items on customers' bills.⁹ As described in these comments, recovery by USF contributors of their USF contributions through billed USF recovery charges creates a competitive inequity. Those carriers who provide service on a billed or post-paid basis have the opportunity to recover their contributions through billing line item surcharges. Those who provide service on a non-billed basis such as providers of prepaid services do not have that opportunity. This disparity creates a situation in which some providers (*i.e.*, providers of billed services) are able to offer service at lower advertised prices and recover their USF contributions through surcharges than are providers of prepaid service who have no such opportunity. One way to eliminate the competitive inequity and level the playing field would be to prohibit all providers of interstate telecommunications services from imposing USF recovery pass through charges on their bills.

The Commission has the authority to promulgate rules governing billing of telecommunications services by telecommunications carriers and has done so in the past,

⁸ FNPRM at ¶ 24.

⁹ *Id.*, at ¶ 394.

including, *e.g.*, its truth-in-billing regulations.¹⁰ If the Commission fails to establish an appropriate USF collection mechanism for non-billed telecommunications services such as prepaid wireless services, as recommended in these comments, then TracFone respectfully proposes that the Commission promulgate a rule prohibiting any provider of interstate telecommunications service from recovering USF contribution amounts through line item assessments on customer bills. Such a rule would be necessary to avoid the competitive inequity which would result from allowing some providers to offer lower advertised prices and recover their USF contributions through their billing process when other providers, including providers of prepaid services with whom they compete, have no opportunity to recover USF contributions through customer billings.

The Commission should be aware that mandatory bundling of USF contributions in carriers' service rates would present other problems. If the Commission were to require telecommunications carriers to bundle their USF contributions in their rates rather than as line item pass through charges on customer bills, then those bundled rates (including the portion of those rates which recovers the providers' USF contribution costs) would become subject to state sales tax assessments. Imposition of state sales taxes on prices which include USF fees would create an inequitable situation in that consumers of prepaid services would be required to pay higher state sales taxes than those paid by consumers of post-paid/billed services. Moreover, whatever authority the Commission has to prescribe how USF contributions are recovered through billed services would not be relevant to a separate but equally important problem -- how to recover USF contributions for non-billed services such as, for example, prepaid wireless services. In the following section of these comments, TracFone offers a very practical, equitable

¹⁰ 47 C.F.R. § 64.2400 *et seq.*

and lawful solution to that problem -- mandatory collection of USF contributions at the retail point of sale.

III. Since Recovery of USF Contributions From Consumers Through Carrier Billing Processes is not Available for Non-billed Services such as Prepaid Wireless Services, the Commission Should Require that USF Contributions on Prepaid Services be Recovered at the Point of Retail Sale

Section 254(d) imposes the USF contribution obligation on providers of interstate telecommunications services, not on consumers of such services. However, since establishment of the USF in 1997, virtually all telecommunications carriers offering billed services have assessed USF recovery charges on their consumers so that ultimately USF contributions are borne by consumers, not by providers. In fact, there is a Commission rule governing such USF pass through charges.¹¹ Section 54.712 has worked well to enable providers of billed telecommunications services to recover their USF contribution costs without enabling such carriers to create “profit centers” out of USF recovery by marking up USF surcharge amounts. Unfortunately, the Commission’s rules contain no comparable mechanism for enabling providers of non-billed services including, for example, prepaid wireless services like those provided by TracFone and others, to recover their USF contribution costs from their customers.

This omission from the Commission’s rules is a matter of growing importance. Currently, about 72 million consumers utilize such prepaid services. Indeed, most wireless carriers, including those whose services have been primarily provided on a post-paid, billed, basis, offer prepaid services. For many carriers, the prepaid portion of their business is the most rapidly-growing portion. With no opportunity to recover their USF contributions through end

¹¹ Pursuant to Section 54.712(a) (47 C.F.R. § 54.712(a)), USF contribution costs may be recovered through charges to end users as line item charges on customer bills, provided that the charges not exceed the interstate telecommunications portion of the customer’s bill times the relevant contribution factor.

user billed charges as contemplated by Section 54.712, those providers are left with a difficult choice: they must either i) raise their prepaid service rates (often above competitive levels) to include sufficient amounts to offset their USF contributions; or ii) remit USF contributions from their own resources. Above market pricing and reduced profitability undermine the consumer welfare benefits of a competitive marketplace. For that reason, TracFone suggests that as part of USF contribution reform, the Commission promulgate a rule requiring that USF contributions on such prepaid services be collected by vendors of those services at the point of retail sale (*i.e.*, sale to the ultimate consumer).

Under a point-of-sale collection method, whoever sold the service to the consumer would be responsible for collection of the USF contribution amount from the consumer. For example, in situations where TracFone sells service to consumers through its website (www.tracfone.com) or via a toll-free number, TracFone would add to the purchase price an amount to cover the purchaser's share of TracFone's USF contribution. That amount would be collected from the consumer and remitted to USAC. In fact, TracFone does this today. When consumers purchase prepaid service directly from TracFone, it adds a USF surcharge to the sales price and remits the collected surcharge amounts to USAC as part of its USF contribution payments. In cases where prepaid services are sold to consumers by retail vendors, the retail vendors would do the same thing: those vendors would add a USF surcharge to the purchase price and would remit the collected proceeds to the service provider who, in turn, would be responsible for inclusion of those remitted amounts in their Form 499 reports and for ultimate remittance to USAC. It would not matter whether the retail vendor was the service provider itself (some providers such as Verizon Wireless, AT&T Mobility, T-Mobile, Sprint and Cricket operate their own retail stores and kiosks where they sell their prepaid services), or whether the retail vendor was independent

of the provider (*e.g.*, retail stores such as Wal-Mart, Target, CVS, Best Buy, Radio Shack, local convenience stores, and many others sell prepaid services on behalf of service providers).

Many states have recognized the wisdom of such point-of-sale collection mechanisms in other contexts. For example, approximately twenty-eight states have enacted legislation which requires that emergency calling service fees (so-called 911 fees) be collected by retail vendors of prepaid services at the point of retail sale. In those states, consumers of prepaid services are assessed 911 fees on their purchases which are collected by the retail vendor. The vendor, in turn, remits the collected 911 fee proceeds to the appropriate state revenue department. There is no reason why a point-of-sale collection method would not be workable for collection of USF contributions.¹²

Imposition of a point-of-sale collection requirement would necessitate that the Commission promulgate a rule which imposes collection obligations on those retail vendors who are not themselves telecommunications carriers and who are not subject to Title II of the Communications Act. However, the Commission has broad authority under Title I to impose requirements on entities not otherwise subject to regulation under other titles of the Act, including, for example, Title II and Title III, when deemed necessary and appropriate to achieve the goal's and purposes of the Act. It has exercised that authority in appropriate situations where necessary to achieve the Act's goals.

The Commission exercised such authority several years ago when it established rules requiring retail vendors of television sets to label television receivers available for sale at their

¹² One state, Maine, by statute, already requires collection of state universal service fund fees, in addition to 911 fees, at the retail point of sale.

store locations which were not capable of receiving, decoding and tuning digital signals.¹³ The Commission determined that “it is necessary and appropriate to require retailers to provide consumers with information regarding [the DTV] transition date at the point of sale.”¹⁴ The Commission concluded that retail vendors of television sets, notwithstanding the fact that they are not otherwise subject to the Act, are in the best position to provide consumers with information regarding digital televisions. Similarly, retail vendors of prepaid wireless services and products, despite the fact that they are not otherwise subject to the Act, are in the best position -- indeed the only position -- to be able to collect USF contributions from consumers of those services and to remit the collected proceeds to USAC.

If the Commission is committed to having all telecommunications services, including prepaid wireless services, contribute to the support of universal service, and that such contributions be equitable, competitively neutral and non-discriminatory, then the Commission should exercise its Title I authority as it has done in the past, and require that those who sell prepaid services to consumers bear responsibility for collecting the USF contributions and remitting the collected amounts to the service provider for subsequent remittance to USAC.

Conclusion

For the reasons described in these comments, TracFone respectfully urges the Commission to consider the views expressed herein in determining whether and how to change the methodologies governing collection and remittance of contributions to the federal Universal Service Fund and that it specifically consider the impact of contribution methodology

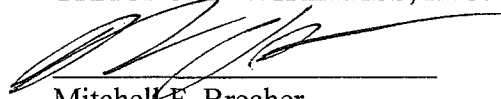
¹³ 47 C.F.R. § 15.117(k). Second Periodic Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television, 22 FCC Rcd 8776 (2007) (“Retail Vendor DTV Order”).

¹⁴ Retail Vendor DTV Order at ¶ 1.

requirements on those providers who offer non-billed services and who therefore are unable to recover any portions of their contributions throughout the customer billing process.

Respectfully submitted,

TRACFONE WIRELESS, INC.

A handwritten signature in black ink, appearing to read 'Mitchell F. Brecher', is written over a horizontal line.

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Attachment

TracFone Wireless, Inc.

Prepaid Wireless "By the Minute" USF Contribution Proposal

June 13, 2007

- "Pay-as-you-go" prepaid wireless services that do not have a direct monthly billing relationship with end users should not be subject to a flat, monthly USF fee based on working telephone numbers, connections or similar method.
- A monthly per number charge of \$1.00¹ would substantially increase TracFone's USF contribution requirements. A number fee would disproportionately burden low volume prepaid wireless services and would not be competitively neutral.
- TracFone's "pay-as-you-go" customers are both lower-volume and lower-income consumers. Approximately 50% of TracFone's customers report incomes of \$25,000 or less. On average, TracFone customers use less than 80 minutes of service per month. Only about 11 of these minutes are interstate calls (less than 14%).
- Others have recognized that a numbers-based plan would not be appropriate for prepaid wireless service providers and their consumers. On March 3, 2006, Verizon Communications and Verizon Wireless filed the following recommendation with the Commission:

It is more difficult for prepaid wireless providers to pass through a monthly per number assessment because they do not send monthly bills to customers. Since prepaid wireless customers do not buy service by the month but instead buy blocks of minutes, often in low amounts, a per-month assessment is infeasible. The FCC should either preserve the current revenues-based assessment for prepaid wireless, or adopt a per-number assessment that reflects the unique characteristics of this service.

[Letter from Kathleen Grillo, Vice President, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, Docket 96-45, filed March 3, 2006, at 3]

¹ A coalition of major carriers lobbying for the number plan estimates "the per-number fee would likely be no higher than \$1.20 per month." Unless fund growth is restrained, the actual fee could be higher.

- The Boucher – Terry USF Bill (H.R. 2054) currently contains a Low-Volume Carrier provision that states:

(C) LOW VOLUME EXCEPTION.—The Commission shall not materially increase the contributions of communications service providers whose customers typically make a low volume of calls on a monthly basis.

- Senator Steven’s USF bill (S. 101) contains a similar Low-Volume Carrier provision:

(C) ADJUSTMENTS.—The Commission shall adjust the contribution for communication service providers for their low-call volume, non-business customers.

- If the Commission is going to adopt a numbers-based USF contribution methodology, TracFone urges the Commission to consider the following alternative methodology for “pay-as-you-go” prepaid wireless:

- This alternative USF contribution method would apply only to pay-as-you-go prepaid wireless service for which there is no direct, monthly billing relationship between a carrier and the end user.
- The newly adopted number fee would be converted to a “by the minute fee” for this class of service.
 - Assume the new number fee is \$1.00 per working number each month.
 - Assume that the CTIA reports the average wireless customer usage as 800 minutes per month.
 - The per minute USF fee would be calculated by dividing \$1.00 by 800, which equals \$0.00125 per minute.
 - The prepaid wireless carrier would be assessed USF contributions by taking the total number of prepaid

minutes times the per minute factor (\$0.00125 in this example).

- Under this approach, the USF assessment applicable to a prepaid wireless customer using the same number of minutes per month as the average postpaid wireless customer would be the same, i.e., \$1.00 for 800 minutes of use.
- While the postpaid wireless customer would pay the \$1.00 fee as a surcharge on his or her monthly bill, in the case of prepaid wireless, the fee would be paid by the prepaid service provider, because there is no billing relationship between the prepaid carrier and the customer.

This approach is fair, equitable, non-discriminatory and competitively neutral and would be a good option in the event that the FCC decides to move USF Contributions to a "numbers-based" system.

* * * * *